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IN THE COURT OF CRIMINAL APPEALS

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OF THE STATE OF TEXAS

BURT LEE BURNETT,

Appellant,

V.

STATE OF TEXAS,

Appellee.

On Appeal From The Court of Appeals
Eleventh Judicial District, Eastland, Texas
Cause Number 11-14-00147-CR
County Court at Law No. 1 of Taylor County, Texas
Honorable Billy John Edwards by Assignment
Trial Court Cause Number 1-662-13

STATE'S BRIEF ON THE MERITS

James Hicks
Criminal District Attorney
Taylor County, Texas
300 Oak Street, Suite 300
Abilene, Texas 79602
325-674-1261
325-674-1306 FAX

BY: Britt Lindsey
Assistant District Attorney
300 Oak Street, Suite 300
Abilene, Texas 79602
State Bar No. 24039669
LindseyB@taylorcountytexas.org

BURT LEE BURNETT, APPELLANT

V.

STATE OF TEXAS, APPELLEE

IDENTITY OF PARTIES AND COUNSEL

Appellant: Burt Lee Burnett

Appellee: State of Texas

Trial Attorney for Appellant:

Trial Attorney for State:

Frank Sellers
Daniel W. Hurley
Hurley, Guinn & Sellers
1805 13th Street
Lubbock Texas 79401

Arimy Beasley
Will Lundy
Assistant District Attorneys
Taylor County Courthouse
300 Oak Street, Ste. 300
Abilene, Texas 79602

Appeal Attorney for Appellant:

Appeal Attorney for State:

Frank Sellers
Hurley, Gwinn & Sellers
1805 13th Street
Lubbock, Texas 79401

Britt Lindsey
Assistant District Attorney
Taylor County Courthouse
300 Oak Street, Ste. 300
Abilene, Texas 79602

Presiding Judge (sitting by assignment):

Honorable Billy John Edwards
County Court at Law 1
300 Oak St.
Abilene, Texas 79602

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STATE'S BRIEF ON THE MERITS

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Comes now the State of Texas, by and through her Assistant
Criminal District Attorney, Britt Lindsey, and submits this Petition
for Discretionary Review pursuant to Tex. R. App. Proc. 68.

STATEMENT REGARDING ORAL ARGUMENT

The State did not request oral argument, and no argument
was granted by the Court.

STATEMENT OF THE CASE

Appellant was convicted of driving while intoxicated and unlawful carrying of a weapon. The Eastland Court of Appeals remanded for a new trial on the grounds that evidence that appellant had pills in his possession was not relevant and should not have been admitted, and that the jury charge should not have contained the full definition of intoxication. The State now appeals the ruling of the Eastland Court of Appeals.

ISSUE PRESENTED

- 1. Did the court of appeals misapply this Court's decision in *Ouellette v. State* in determining that the inclusion of the full statutory definition of intoxication in a jury charged constitutes harmful error?**

SUMMARY OF THE ARGUMENT

Ouellette held that even if charging a jury with the full definition of intoxication could be error in another case, it did not rise to the level of error given the facts presented. This case is not so different from *Ouellette* that it requires reversal when that case did not. *Ouellette* did not expressly decide whether giving the full “subjective” definition could be error under different circumstances; the State would further submit that it should not be error to charge

a jury with the Section 49.01(2) definition of intoxication as given by the Legislature. Moreover, even if instructing the jury on the full definition is error, there is no harm when the definition is given in the absence of an additional “synergistic effect” instruction.

STATEMENT OF FACTS

Clinton Coapland, Abilene Police Officer, was called to a scene of a rear-end collision accident. (RR5: 114-117, 120-122) The accident was near an entrance ramp to Winter’s Freeway. (RR5: 91-93, 121-124) The front vehicle, a Tahoe, had two passengers in the vehicle, Michael Bussey and Nathan Chapa. (RR5: 47-54, 90-96, 123-124) Coapland later testified that when he arrived and asked appellant what had happened that he had to repeat questions, he could not understand appellant because his speech was slurred, and he smelled alcohol emanating from appellant. (RR5: 125-127) Appellant indicated that the Tahoe had slammed on its brakes. (RR5: 126) Bussey testified he did not deny he slammed on his brakes; he indicated that appellant staggered up to the vehicle and asked them if everyone was okay. (RR5: 49-53) Appellant

was reluctant to wait for the police and said that they should just go on their way. (RR5: 53-54, 96-98) Bussey testified that he smelled alcohol on appellant. (RR5: 54-55) Chapa testified that appellant smelled of alcohol, his speech was slurred and his eyes were glassy. (RR5: 95-96) Coapland talked with Bussey and Chapa, then he returned to appellant and asked appellant if he had been drinking. (RR5: 128-130) Appellant said no and agreed to perform the standardized field sobriety tests (SFSTs). (RR5: 129-131)

Coapland began with the Horizontal Gaze Nystagmus (HGN) test and found six out of six clues indicating alcohol consumption. (RR5: 134-144, 166) (SX: 1) At trial Coapland testified that alcohol or drugs could cause nystagmus. (RR5: 142-143) Next appellant performed the walk and turn (W-T) test. (RR5: 144-148, 167-168) (SX: 1) Coapland observed four out of eight clues indicating intoxication. (RR5: 146-148) Finally, Coapland had appellant perform the one-leg stand (OLS) (RR5: 150-152, 168-169) (SX: 1) Coapland noted all four clues of intoxication on this test. (RR5: 150-152) Appellant was placed

under arrest for DWI. (RR5: 153-155) During the search of appellant, Coapland found 20 white pills and another type of pill in appellant's pocket. (RR5: 161 (SX: 7) The pills were wrapped in a makeshift baggie. (RR5: 161) (SX: 8)

Appellant's vehicle was also searched and a gun and some more pills were found in his car. (RR5: 182-184) (RR6: 115-117) (SX: 6, 9). When Coapland found the pills he was not sure if the intoxication was by alcohol or some type of pill. (RR5: 171-172, 215-216) Appellant was read his *Miranda* warnings and the statutory warnings. (RR5: 161, 172-174) (SX: 1-4) Appellant refused to give a breath or blood sample. (RR5: 173-176) Coapland testified that he did not apply for a warrant to take appellant's blood sample. (RR5: 171-173) Coapland testified he believed he did not need a warrant because intoxication was established by the failure of these tests. (RR5: 176-180) Jacob Allred was the secondary officer at the scene and his primary role was traffic control. (RR6: 109-111) Allred issued appellant a citation for following too close. (RR6: 111-112) Allred testified that he could smell alcohol on appellant when he

issued appellant the citation. (RR6: 112-114) Allred conducted the inventory search of appellant's car and found loose pills, the gun, and a prescription bottle. (RR6: 114-118, 122-126) Coapland testified that appellant had vertical nystagmus but admitted he was not trained on vertical nystagmus. (RR6: 80-81) Coapland testified that after appellant was arrested appellant seemed confused; he testified that appellant asked him about the other two tests for signs of intoxication, indicating that appellant believed Coapland had not given the one-leg stand and walk-and-turn tests when he had in fact given those tests. (RR5: 154-156) (RR6: 82-86, 103-104)

Prior to trial, defense counsel filed a motion to suppress regarding the type of pills found in appellant's pocket among other issues. (RR3: 6-68) At that time the State offered to redact the portions of the DVD that specifically referred to hydrocodone. (RR3: 59-68) The DVD contains two instances where the pills are referred to as hydrocodone; in one Officer Coapland states that the pills look like hydrocodone and asks appellant if he has a prescription for them, to which appellant

responds “yes.” (SX 1 at 9:31-9:34 p.m. and 9:41 p.m.) The trial court did not rule on that issue at the time of this hearing. (RR3: 67-68)

On the day of trial defense renewed their objection to the evidence of hydrocodone pills. (RR5: 6-24) The State argued that the hydrocodone pills were admissible as same-transaction contextual evidence and that because it is not required to show the type of intoxicant, the pills were admissible as part of the offense. (RR5: 6-9, 14-19, 22-24) Before the trial court ruled on the issue the specific portions of the video in question were played for the court. (RR5: 13-14) The trial court ruled that the evidence was admissible as same transaction and/or res gestae. (RR5: 24) Defense objected under Rules 403, 702 and 703 and the trial court overruled those objections. (RR5: 24-25) The trial court ultimately allowed the video to be played and allowed the pills to be entered into evidence. (RR5: 183-184) (SX: 1, 7, 8)

At trial, Coapland testified that he was not trained to assess impairment due to drugs, only alcohol. (RR6: 78) Appellant specifically questioned Coapland if he was trained on the effects of

hydrocodone and Coapland testified that he was not. (RR6: 78-80)
The trial court did not allow Officer Coapland to identify the pills.
(RR5: 157-160)

ARGUMENT

Standard of Review

In reviewing charge errors appellate courts must first determine whether error actually exists. *Olivas v. State*, 202 S.W.3d 137, 143-44 (Tex. Crim. App. 2006); *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984) (op. on reh'g). The next step in the process occurs only if the court finds error. *Olivas* at 143-44. If error exists, the standard of review differs depending upon whether there was a timely and proper objection to the charge. *Bluitt v. State*, 137 S.W.3d 51, 53 (Tex. Crim. App. 2004). If the error was subject to a timely objection, reversal is required if there is some harm to the defendant as a result of the error. *Ovalle v. State*, 13 S.W.3d 774, 786 (Tex. Crim. App. 2006); Tex. Code Crim. Proc. art. 36.19; Appellant must show egregious harm if the error is not preserved. *Almanza*, 686 S.W.2d at 171. The harm caused by the error must be considered “in light of the entire

jury charge, the state of the evidence, including the contested issues and the weight of probative evidence, the arguments of counsel and any other relevant information revealed by the record of the trial as a whole.” *Almanza* at 171. Appellant must have suffered actual harm, not merely theoretical harm. *Arline v. State*, 721 S.W.2d 348, 352 (Tex. Crim. App. 1986)).

The inclusion of the statutory definition of intoxication is not error

The Texas DWI statute states that “[a] person commits an offense if the person is intoxicated while operating a motor vehicle in a public place.” Tex. Pen. Code § 49.04. There are two statutory definitions for “intoxicated” in this section:

“Intoxicated” means:

(A) not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, a dangerous drug, a combination of two or more of those substances, or any other substance into the body; or

(B) having an alcohol concentration of 0.08 or more.

Tex. Pen. Code § 49.01(2). These two definitions are sometimes referred to as the “subjective” definition and the “per se” definition. *See, e.g. Crenshaw v. State*, 378 S.W.3d 460 (Tex.

Crim. App. 2012). At trial, appellant objected to the inclusion of the full Section 49.01(2)(A) definition of intoxication in the jury charge and requested that the definition be limited to alcohol consumption. Counsel requested that the definition of intoxication not include the language “drugs, a controlled substance, or a combination of those or any other substance,” and that “a controlled substance, a drug, a dangerous drug, or a combination of two or more of those substances, or any other substance into his body” be removed from the application paragraph. (RR6: 129-130) Those objections were overruled. (RR6: 134) The Eastland Court of Appeals ruled that this was error, relying on this Court’s decision in *Ouellette v. State*, 353 S.W.3d 868 (Tex. Crim. App. 2011) in ruling that the trial court erred in including the full definition of intoxication. However, the Court in *Ouellette* expressly declined to decide that issue. Moreover, the Court ruled in *Ouellette* that even if a court could err under some circumstances in submitting the full definition of intoxication, the trial court in that case did not.

The State first argues this case bears more similarity than dissimilarity to *Ouellette*. In *Ouellette*, a driver rear ended another

car while driving. *Id.* at 868-69. The responding police officer testified that he smelled alcohol on the driver's breath, and the driver stated she had drank a glass of wine. *Id.* at 869. The officer administered two field sobriety tests, and based on the results of the tests, her physical symptoms of intoxication, and the odor of alcohol, placed her under arrest. *Id.* After the arrest, another officer found a pill bottle in the vehicle containing three types of pills. *Id.* The driver identified the pills as Soma and Darvocet, and said that she could not remember the third type. *Id.* She said that the pills were prescribed to her but that she had not taken any in over a month. *Id.* She offered to take a blood test but declined when told that a blood test would also show alcohol content. *Id.* At trial the officer testified that Soma was a CNS depressant which could cause the horizontal gaze nystagmus that he observed. *Id.* The State argued to the jury that they could find the driver was intoxicated by either the pills, the alcohol, or both. *Id.*

On appeal, the driver argued that the trial court erred in giving the jury the full statutory definition of "intoxicated" that

included drugs, saying that there was no evidence that appellant was intoxicated by anything other than alcohol. *Id.* at 869. This Court declined to do so in that case, saying “[w]e need not decide that issue today; while evidence that the appellant was intoxicated by drugs was circumstantial and not obviously overwhelming, it is nonetheless present in the record.” *Id.* at 870. The court noted that the officer testified that both alcohol and Soma are CNS depressants. *Id.* The Court further observed that, as in this case, the decision was made to arrest the driver before the pills were found. *Id.*

The Court noted in *Ouellette* that the DWI statute provides a definition that focuses on the state of intoxication, not on the intoxicant. *Id.* at 869. In so noting, the Court quoted the dissent of Judge Cochran in the case of *Gray v. State*, 152 S.W.3d 125, 136 (Tex. Crim App. 2004), in which she stated “[t]he law does not differentiate between the drunk driver who was intoxicated because he consumed alcohol, or injected heroin, or sniffed glue, or took prescription medicine.”

The full text of Judge Cochran's dissent in *Gray* partially quoted in *Ouellette* merits examination. Judge Cochran in *Gray* dissented with the majority's opinion regarding the so-called "synergistic effect" jury instruction,¹ and warned against heading in the direction of forcing the State to prove the intoxicant rather than the intoxication:

I think that appellant is technically correct. However, I would take this opportunity to overrule *Garcia* which held that, in a DWI prosecution, "the type of intoxicant used, i.e., alcohol, a controlled substance, a drug, or a combination of two or more of these substances, becomes an element of the offense and critically necessary to the State's proof." *Garcia* is no longer good law because the DWI statute has been amended so that the type of intoxicant that a person consumed to become physically or mentally impaired is of no legal significance. When *Garcia* was decided in 1988, there were only three possible "intoxicants" that were subject to prosecution under the DWI statute: alcohol, a controlled substance, or a drug. A driver who was impaired because of the ingestion of any one of these three substances, either alone or in combination, could be convicted of DWI. In 1993, the Legislature amended the definition of "intoxicated" to include "alcohol, a controlled substance, a drug, a dangerous drug, a combination of two or more of those substances, or *any other substance*." Any other substance at all. Under current law, if a person eats too many M&Ms- either alone or in combination with alcohol, drugs, water, or whatever- such that his mental

¹ The "synergistic effect" instruction discussed in *Gray* was not given in the instant case.

and physical faculties are impaired, he may be prosecuted for DWI. However, “eating M&Ms” is clearly not an element of the offense of DWI. “Intoxicated” is an element of DWI, and it is a physical state of being, regardless of the specific substance which caused the impairment....[t]hese laws are not focused upon the type of substance that caused the driver to become “drunk” and then get behind the wheel of a car. The law does not differentiate between the drunk driver who was intoxicated because he consumed alcohol, or injected heroin, or sniffed glue, or took prescription medicine. It is the act of driving while one's mental or physical faculties are impaired that is inherently dangerous and the target of our DWI law.

Gray at 786 (emphasis in original, internal citations omitted).

The State concedes that some differences exist between the instant case and *Ouellette*. In *Ouellette*, the pills were shown to the driver at the time of the arrest, who identified them as Soma and Darvocet. *Ouellette* at 869. In the instant case, arresting officers stated on video that they believed that the pills were hydrocodone and asked appellant if he had a prescription for them, to which he responded “yes.” (SX: 1 from 9:31 pm) In *Ouellette*, the arresting officer testified as to the effects of Soma; in the instant case, Officer Coapland stated that he was not qualified to testify as to the effects of hydrocodone. (RR6: 78-80) However,

in both cases the decision was made to arrest the driver following an accident based on the odor of alcohol on the breath, poor performance on field sobriety tests, and physical observation of symptoms of intoxication prior to any pills being found in the respective driver's vehicles. *See Ouellette* at 869. In both cases, the arresting officer testified that when he arrested the driver, prior to any pills being found, he did so because he believed the driver to be intoxicated by alcohol. *Id.* In both cases there was no direct evidence that the driver had consumed any of the drugs found in his vehicle. *See Ouellette* at 870. The State would submit that appellant's case is not so different from *Ouellette* that it was error to include the full statutory definition of intoxication when it was not erroneous in that case.

Because the State is required to prove intoxication rather than the intoxicant, the jury charge should simply give the jury the statutory definition of intoxication and allow the jury to determine if that definition has been met. Forcing the State to omit portions of the Section 49.01(2)(A) definition of intoxication from the abstract and application portions of the jury charge

contravenes the purpose of having an all-inclusive statutory definition which rightly focuses on the defendant's state of intoxication rather than the specific intoxicant. If a criminal defendant were to demonstrate clear evidence of extreme intoxication yet provides a breath sample showing a blood alcohol level considerably below .08, the defendant's own behavior is indicative that some other substance contributed to his intoxication even if the exact nature of the intoxicant is not known or cannot be determined. Under the Eastland Court's rationale, the jury charge in this defendant's case would only be allowed to give an instruction on alcohol; the possibility that the defendant may be intoxicated on "any other substance" may not even be considered.

Even if the inclusion of the full statutory definition is error, it is not harmful in the absence of a "synergistic effect" instruction

Assuming without conceding that the inclusion of the full definition of intoxication constituted some error, the State would argue that any error caused no harm. This Court has ruled that the full (or near full) statutory definition of intoxication taken in

conjunction with a “synergistic effect” instruction is harmful error, but has never found that the statutory definition in the absence of a synergistic effect instruction constitutes harm.

One month after this Court’s decision in *Ouellette*, the Court addressed a similar issue in *Barron v. State*, 353 S.W.3d 879 (Tex. Crim. App. 2011), which involved alcohol and hydrocodone in a driving while intoxicated case. In *Barron*, the State presented evidence at trial in the form of officer testimony that the hydrocodone found in the defendant’s possession had a “cumulative effect” rather than an “additive effect” on the alcohol she admitted to consuming. *Barron*, 353 S.W.3d at 883. The jury charge included most of the “subjective” statutory definition of intoxication, omitting only the language of “any other substance;” the defendant did not object to this portion of the charge.² *Id.* at 882-83. However, in addition to the statute-based definition, the State also requested a “synergistic effect” instruction which was objected to, which read:

² Specifically, the charge contained a statute-based definition of intoxication that included “not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a drug, a dangerous drug, or a combination of two or more of those substances into the body.” *Barron* at 884.

if a person by the use of medications or drugs renders herself more susceptible to the influence of intoxicating alcohol than she otherwise would be and by reason thereof became intoxicated from the recent use of intoxicating alcohol, she is in the same position as though her intoxication was produced by the intoxicating alcohol alone.

Id. at 884. On appeal, the Austin Court of Appeals found that this was error because “there is no evidence that the appellant ingested hydrocodone, hydrocodeine, or any other prescription medication on the day in question,” and found some harm because “there is no evidence in this record that appellant ingested any intoxicating substances other than alcohol.” *Id.* at 883.

This Court agreed that this constituted error, but found that the court of appeals’ harm analysis simply repeated its error analysis. *Id.* The Court found that the true harm was the delivery of the additional “synergistic effect” instruction that was not raised by the evidence in addition to the statute-based definition that was given. *Id.* The evidence showed that the defendant had consumed minimal alcohol and was not heavily intoxicated, and

the State admitted at a motion for new trial hearing that the prosecution “needed evidence of the pills to prove intoxication.” *Id.*

The crucial difference between *Barron* and the instant case is that in *Barron* the court specifically found that the “appellant was harmed by the additional ‘synergistic effect’ instruction,” and no such instruction was given here. *Barron* at 884. The “synergistic effect” instruction caused harm because it “emphasiz[ed] a particular theory or the weight to be given to a particular piece of evidence...[it] introduced a specific mode of action and supported the State's theory that the combination of hydrocodone and alcohol produced intoxication.” *Id.* Absent that additional instruction, any error is harmless. At most, the jury charge provided the jury with superfluous portions of the definition that were not needed to reach the conclusion that appellant was intoxicated. This Court has held that unnecessary jury instructions in the abstraction are “merely superficial abstraction” which “never produces reversible error in the court's charge because it has no effect on the jury's ability fairly and accurately to implement the commands of the application

paragraph or paragraphs.” *Plata v. State*, 926 S.W.2d 300, 302-03 (Tex. Crim. App. 1996), *overruled on other grounds*, *Malik v. State*, 953 S.W.2d 234, 239 (Tex. Crim. App. 1997); *see also Price v. State*, 457 S.W.3d 437, concurrence fn. 2 (Tex. Crim. App. 2015) (Yeary, J., concurring). In this instance the definition was repeated in the application portion of the charge, but the definition was not an incorrect or misleading statement of the law, did not authorize the jury to convict on illegal grounds, and did not emphasize any particular theory or weight of the evidence. Saying that there was insufficient evidence of one of the specific intoxicants mentioned in the application paragraph requires that the State prove the intoxicant rather than simply proving that appellant was intoxicated by whatever means. The State alleged that appellant was intoxicated as the law defined that term, and the jury so found.

PRAYER FOR RELIEF

The State prays that this Court reverse the judgment of the Eastland Court of Appeals and uphold the conviction of the trial court.

Respectfully submitted,

James Hicks
Criminal District Attorney
Taylor County, Texas
300 Oak Street, Suite 300
Abilene, Texas 79602
325-674-1261
325-674-1306 FAX

BY: /s/ Britt Lindsey
Britt Lindsey
Assistant District Attorney
Appellate Section
300 Oak Street, Suite 300
Abilene, Texas 79602
325-674-1376
325-674-1306 FAX
LindseyB@taylorcountytexas.org
State Bar No. 24039669
Attorney for the State

CERTIFICATE OF COMPLIANCE

I, Britt Lindsey, affirm that the above brief is in compliance with the Rules of Appellate Procedure. The font size in the brief is 14 point, excepting footnotes which are 12 point. The word count is 4507.

/s/ Britt Lindsey
Britt Lindsey

CERTIFICATE OF SERVICE

I certify that on this 28th day of October, 2016, a true copy of the foregoing State's Brief was served on the Attorney for Appellant according to the requirements of law by email or efilng to:

Frank Sellers
Hurley, Gwinn & Sellers
1805 13th Street
Lubbock, Texas 79401

Email: frank@hurleyguinn.com

Lisa McMinn
State Prosecuting Attorney
P.O. Box 12405
Austin, Texas 78711

Email: information@spa.texas.gov

/s/ Britt Lindsey
Britt Lindsey